

# Decisions of Interest

FEB. 27, 2023

## CRIMINAL

### U.S. SUPREME COURT

#### ***Davis v United States*** | Feb. 21, 2023

CERT DENIED | DISSENT | IAOC AS TO NO PLEA TALKS

Justice Jackson, joined by Justice Sotomayor, dissented from the denial of a petition for certiorari. The petitioner satisfied the first *Strickland* prong because counsel failed to initiate plea negotiations with the government. The Circuits were divided as to whether an actual plea offer was needed to show prejudice, as the 11<sup>th</sup> Circuit held here. If not for that threshold requirement, it was likely that the petitioner would have prevailed. Each of the five codefendants negotiated favorable deals and received sentences of less than 40 years for the subject series of armed robberies, whereas the defendant—who was 18 at the time of the crimes—received a sentence of 160 years after trial.

[Davis v United States](#)

### FIRST DEPARTMENT

#### ***People v Anonymous*** | Feb. 22, 2023

DEFENDANT'S SILENCE | HARMLESS ERROR

The defendant appealed from a judgment of New York County Supreme Court convicting him of 1<sup>st</sup> degree murder and other crimes. The First Department affirmed. The police officer's testimony about what the defendant did not say while being questioned at the police precinct after his arrest was improper and should have been stricken (see *People v Williams*, 25 NY3d 185, 193 [2015] [evidence of defendant's selective silence generally may not be used by People in case-in-chief to allow jury to infer admission of guilt]). While the defendant did not preserve his current constitutional challenge, he did ask the trial court to "strike all previous questions" on the improper subject. The lower court erroneously denied the request, but the error did not require a new trial under the circumstances of the case.

[People v Anonymous \(2023 NY Slip Op 00962\)](#)

## SECOND DEPARTMENT

### ***People v Capers*** | Feb. 22, 2023

SEARCH WARRANT | OVERLY BROAD | SUPPRESSION

The People appealed from a Queens County Supreme Court order that granted the defendants' suppression motion and dismissed the indictment. The Second Department affirmed. The search warrant—which described the subject location as a two-story, two-family home with separate entrances and alleged that there was reason to believe that guns and ammunition might be found at the subject premises—was overly broad. The sole basis for the warrant was information from a CI, who had only seen guns in the downstairs unit. Guns, ammo, and drugs were recovered from the first floor, but nothing was found on the second floor. The warrant was ambiguous as to whether it authorized a search of a single residence or the two separate residences. The illegal portion of the warrant was not severable. Appellate Advocates (Celena L. Ditchev, of counsel) and Garrett H. Sullivan separately represented the respondents.

[People v Capers \(2023 NY Slip Op 01011\)](#)

### ***People v Ramis*** | Feb. 22, 2023

EXPERT TESTIMONY | INSUFFICIENT FOUNDATION

The defendant appealed from a Nassau County Supreme Court judgment convicting him of 23 counts of drug-related charges. The Second Department vacated the convictions and granted a new trial on 15 counts charging possession or sale of heroin or cocaine. Five experts concluded that the substances tested were heroin or cocaine after comparing the substances with standard samples in the lab that were known to be heroin or cocaine. However, none of the experts' testimony established the standard or testing used to ensure that the lab reference samples were heroin or cocaine. Thus, the People did not establish a foundation for the competence of the expert testimony. Beverly Van Ness represented the appellant.

[People v Ramis \(2023 NY Slip Op 01013\)](#)

### ***People v Trice*** | Feb. 22, 2023

CUSTODIAL INTERROGATION | NO MIRANDA

The defendant appealed from a Nassau County Supreme Court judgment convicting him of 21 counts related to impaired driving and leaving the scene of an accident. The Second Department reversed, suppressed the defendant's statements, vacated his guilty plea, and remanded. The defendant and another man were detained because they matched the description of individuals suspected of leaving the scene of an accident involving a motorcyclist. A State trooper questioned the defendant but did not advise him of his *Miranda* rights. The questioning constituted a custodial interrogation—the defendant's hands were placed on the hood of a police car, at least 10 police vehicles had responded to the location and blocked off the street, and he was not free to leave. Leon H. Tracy represented the appellant.

[People v Trice \(2023 NY Slip Op 01015\)](#)

## THIRD DEPARTMENT

### ***People v Caraballo*** | Feb. 23, 2023

SECOND FELONY OFFENDER | OUT-OF-STATE CERTIFICATION

The defendant appealed from a Schuyler County Court judgment that convicted him of 1<sup>st</sup> degree reckless endangerment and sentenced him as a second felony offender. The Third Department modified by vacating the sentence and remitted for a new second felony offender hearing and resentencing. The People relied on the defendant's prior felony conviction in Massachusetts and submitted the MA equivalent of a NY commitment order and the defendant's public docket report. But the submissions lacked the out-of-state certification required under CPLR 4540 (c). Lipsitz Green Scime Cambria LLP (Erin McCampbell Paris, of counsel) represented the appellant.

[People v Caraballo \(2023 NY Slip Op 01029\)](#)

### ***People v Truitt*** | Feb. 23, 2023

MURDER | INCLUSORY CONCURRENT | CPL 300.40

The defendant appealed from an Otsego County Court judgment convicting him of 1<sup>st</sup> degree arson, 1<sup>st</sup> degree murder, and 2<sup>nd</sup> degree murder (two counts). The Third Department reversed the 2<sup>nd</sup> degree murder convictions, which were inclusory concurrent counts of the 1<sup>st</sup> degree murder charge (see CPL 300.40 [3] [b] ["A verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon"]).

[People v Truitt \(2023 NY Slip Op 01028\)](#)

### ***People v Lockrow*** | Feb. 23, 2023

SORA | BELATED APPEAL

The defendant appealed from a Rensselaer County Court order classifying him as a level three sex offender. The Third Department reversed and remitted. The defendant failed to appear for a 2003 SORA hearing and was designated a level three sexually violent offender, but no written order was issued. In 2006, County Court removed the sexually violent offender designation. A written order effectuating that decision was filed in November 2020. Upon appeal from that order, the defendant was permitted to challenge the level three designation. An appeal from the 2003 decision was not possible since there was no appealable paper, and the 2003 decision was replaced by the 2006 decision. The defendant was not given the requisite 20 days' notice of the 2003 hearing. Dana Salazar represented the appellant.

[People v Lockrow \(2023 NY Slip Op 1030\)](#)

## TRIAL COURTS

### ***People v Moore*** | 2023 WL 2144781

DISCOVERY | COC | CPL 30.30 DISMISSAL

Bronx County Supreme Court granted the defendant's motion to dismiss two counts of 2<sup>nd</sup> degree CPW on statutory speedy trial grounds. The People never filed a COC and SOR concerning such charges. CPL 30.30 (4) (d) provides, in relevant part, that a

reasonable period of delay should be excluded when the defendant is joined for trial with a codefendant as to whom the time for trial has not run. This defendant was joined for trial with a codefendant who was charged with murder and as to whom readiness mandates did not apply, pursuant to subdivision (3) (a). However, the period of delay as to the defendant was unreasonable.

[People v Moore \(2023 NY Slip Op 30472\[U\]\)](#)

### ***People v Gibson* | 2023 WL 2150583**

GRAND JURY | LEGALLY INSUFFICIENT EVIDENCE

The defendant moved for inspection of the grand jury minutes and dismissal of the indictment charging him with robbery. Queens County Supreme Court found the evidence submitted to the grand jury legally insufficient. The only evidence placing the defendant at the scene was his own statement. But he never admitted to the robbery, and the People failed to provide the requisite CPL 60.50 corroboration instruction. Under these circumstances, it could not be said that the grand jury did not indict based on the defendant's statements alone. Kevin O'Donnell represented the defendant.

[People v Gibson \(2023 NY Slip Op 50119\[U\]\)](#)

### ***United States v Dehoyos* | 2023 WL 1998286**

SUPPRESSION | PAROLE CHECK | PROLONGED TRAFFIC STOP

The defendant was charged with possession of a firearm by a convicted felon. He moved to suppress. District Court—NDNY granted the motion. There was no challenge to the lawfulness of the traffic stop at its inception. The question was whether a parole check by the State Police was an ordinary inquiry incident to the stop and, if not, whether it prolonged the stop. The police inquiries were not conducted for officer safety. The police detoured from the mission of the traffic stop to achieve the goal of searching the vehicle to find guns as part of the gun interdiction detail. Further, the inquiries measurably extended the duration of the stop. The Federal Public Defender (John J. Gilsenan, of counsel) represented the defendant.

## **FAMILY**

### **FIRST DEPARTMENT**

#### ***Matter of Susan W. v Darren K.* | Feb. 21, 2023**

CHILD SUPPORT | MATH DISCREPANCY | REMANDED

The father appealed from a New York County Family Court order which denied his objections to findings of fact, held that he willfully failed to pay child support arrears, and entered a judgment of \$61,080 against him. The First Department modified by vacating the amount of arrears for a six-month period and remanded for a recalculation of arrears owed. The Support Magistrate included an additional six months of child support without evidence of nonpayment, and Family Court's calculation differed from that of the Support Magistrate. Richard L. Herzfeld represented the father.

[Matter of Susan W. v Darren K. \(2023 NY Slip 00972\)](#)

## SECOND DEPARTMENT

### ***Matter of Badal v Wilkinson*** | Feb. 22, 2023

LINCOLN HEARING | INTERNATIONAL VISITATION

The mother appealed from a Kings County Family Court order that, among other things, denied her request for in-person visitation. The Second Department reversed and remanded. The mother was arrested and deported to Trinidad and Tobago in 2013 when the child was 15 months old. In 2019, the mother filed a petition seeking phone, video, and in-person parenting time in Trinidad and Tobago. After a hearing, Family Court granted phone and video access, but denied in-person access. The denial was not supported by the record. Family Court should have conducted an in camera interview of the child to assess the mother's claim that his fear of visiting her in person was due to outside influences. Christian P. Myrill represented the mother.

[\*Matter of Badal v Wilkinson\* \(2023 NY Slip 00997\)](#)

## THIRD DEPARTMENT

### ***Matter of Josefina O. v Francisco P.*** | Feb. 23, 2023

TEMP. CHILD SUPPORT | ARTICLE 8 | REVERSED

The father filed a notice of appeal and then a motion for leave to appeal from a Montgomery County Family Court order granting the mother's motion for temporary child support. The Third Department reversed. The motion for permission to appeal was unnecessary. An appeal may be taken as of right from any "order of disposition" (Family Ct Act § 1112 [a])—which is synonymous with a final order of judgment. The instant order was final with respect to the mother's motion for recoupment of federal stimulus payments—which was separate from the relief sought in the underlying family offense petition. The federal stimulus payments were subject to equitable distribution, so Family Court lacked jurisdiction to direct the father to remit those advance tax refunds to the mother. Teresa C. Mulliken represented the appellant.

[\*Matter of Josefina O. v Francisco P.\* \(2023 NY Slip Op 01031\)](#)

### ***Matter of Patrick UU. v Francesca VV.*** | Feb. 23, 2023

RESETTLEMENT | INHERENT POWER

The father appealed from an Ulster County Family Court order granting the mother's motion to resettle a custody/visitation order. The Third Department modified. The mother's motion was not untimely, as there was no specific time limit for such a motion. Resettlement rested on the inherent power of the trial court to cure mistakes that did not affect substantial rights of the parties. A designated paragraph of the order should have been stricken, since the parties did not agree to that term in their oral stipulation. Betty J. Potenza represented the appellant.

[\*Matter of Patrick UU. v Francesca VV.\* \(2023 NU Slip Op 01040\)](#)

### ***Matter of Leo RR. (Joshua RR.)*** | Feb. 23, 2023

NEGLECT | PRENATAL DRUG USE | REVERSED

The father appealed from a Chemung County Family Court order which partially granted the neglect petition. The Third Department reversed and dismissed the petition. Family Court found that the father had neglected his infant daughter by failing to report the mother's prenatal drug use to probation. The parents had agreed that the mother would go to inpatient treatment before turning herself in on a warrant. Although the father could have contacted the mother's probation officer, there was already a warrant out for her arrest, she had absconded from inpatient treatment, and he was unaware of her location. Christopher Hammond represented the father.

[Matter of Leo RR. \(Joshua RR.\) \(2023 NY Slip Op 01041\)](#)

### ***Matter of Ryan Z. v Adrienne AA.*** | Feb. 23, 2023

CUSTODY | HEARING REQUIRED | REVERSED

The father appealed from a Chemung County Family Court order dismissing his custody modification petition. The Third Department reversed. Family Court erred by dismissing the petition without a hearing. The father's petition alleged changed circumstances that, if established, would warrant a best interests review. Rather than accepting the facts as alleged in the petition as true, Family Court improperly relied on unsworn information provided by counsel. Christopher Hammond represented the father.

[Matter of Ryan Z. v Adrienne AA. \(2023 NY Slip Op 01032\)](#)

## FOURTH DEPARTMENT

### ***Matter of Lang v Lang*** | Feb. 2, 2023

COUNSEL | FRIVOLOUS CONDUCT | APPELLATE AFC'S DUTIES

The Fourth Department ordered the appellants/parents and their attorney to show cause why they should not be sanctioned for their frivolous conduct in connection with their prior appeals seeking to vacate an order providing for grandparent visitation. The Fourth Department imposed a \$1,000 sanction against appellants' counsel. The Court found frivolous counsel's assertions that the appellate AFC had been relieved of his duties by the parents and he must not consult with the children, as well as threats by counsel to take legal action against the AFC if he sought to fulfill his duties. The appellate court awarded the appellate AFC reasonable attorney's fees and reimbursements for expenses in connection with the frivolous conduct.

[Matter of Lang v Lang \(2023 NY Slip Op 61467\[U\]\)](#)

## TRIAL COURT

### ***Matter of Curstin B. (Curtis B.)*** | 2022 WL 18830761

NEGLECT | FCA § 1051 (C) | DISMISSED

ACS filed a neglect petition against the father arising out of a car accident that occurred when he was driving with his two children, ages 10 and 7, in the backseat. Family Court held that the father had neglected the children by failing to confirm during the hours after the accident that they did not require medical attention. However, finding that the court's

aid was not required for this family, Family Court dismissed the neglect petition with prejudice (see Family Court Act § 1051 [c]). Brooklyn Defender Services (Jordan Burnett) represented the father.

[Matter of Curstin B. \(Curtis B.\) \(2022 NY Slip Op 51388\[U\]\)](#)

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